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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952 1953

No. 823-87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULB, KENNETH POTTER, and PETER E. MITCHELL, Members of and Collectively Constituting the Public Utilities Commission of the State of California; EVERETT C. McKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, and J. THOMASON PHELPS, Legal Advisers of the Public Utilities Commission of the State of California,
Defendants-Appellants,

vs.

UNITED AIR LINES, INC., a corporation; and CATALINA AIR TRANSPORT, a corporation,
Plaintiffs-Appellees,

CIVIL AERONAUTICS BOARD,

Intervenor-Appellee.

**BRIEF OF APPELLANTS UNDER RULE 12(3)
IN OPPOSITION TO PLAINTIFFS-APPELLEES' STATEMENT
AGAINST JURISDICTION AND MOTION TO
DISMISS OR AFFIRM.**

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PRELIMINARY STATEMENT.

Appellee air carriers in their Statement in Opposition to Appellants' Statement of Jurisdiction and Motion to Dismiss or Affirm (paragraph II,C,2) state that the facts of this case are not disputed and the only question is a legal one, namely: Does the Civil Aeronautics Act grant exclusive jurisdiction to the Civil Aeronautics Board to regulate rates charged by United over its Catalina Route? Such gross misstatement and over-simplification of the matters under consideration on this appeal cannot go unnoticed.

The issues raised by Appellants through this appeal are clearly set forth in the Assignment of Errors and Prayer for Reversal and the Statement as to Jurisdiction on file herein. Should this Court resolve in favor of Appellants certain disputed facts or certain questions of law which are in issue, this Court will not even be required to interpret the provisions of the Civil Aeronautics Act which Appellee air carriers claim grant to the Civil Aeronautics Board exclusive jurisdiction to regulate rates charged by them for transportation between the mainland of California and Catalina Island.

In response to Appellee air carriers' statement against jurisdiction and motion to dismiss or affirm, we shall more fully state the position of Appellants with respect to certain issues which we believe should be given further consideration by this Court.

I

NO CASE OR CONTROVERSY EXISTS BETWEEN APPELLEES AND APPELLANTS WHICH ENTITLES APPELLEES TO THE EQUITABLE RELIEF GRANTED BY THE FEDERAL DISTRICT COURT. UNTIL THE ADMINISTRATIVE PROCESSES OF APPELLANT COMMISSION ARE EXHAUSTED THE FEDERAL DISTRICT COURT HAS NO JURISDICTION.

- A. No provision of the laws of the State of California imposes penalties upon United by reason of its refusal to file with Appellant Commission tariffs of the rates covering its Catalina operations prior to the issuance of an order by Appellant Commission pursuant to the procedural provisions of the California Public Utilities Code.**

Appellee air carriers have made no reference to any provision in the Constitution and statutes of the State of California which requires them to file tariffs with this Commission, for there is none.

Section 22 of Article XII of the California Constitution authorizes Appellant Commission to establish intrastate rates for air carriers operating in California. Pursuant to this provision, Appellant Commission may establish such rates by authorizing or ordering air carriers to file tariffs with Appellant Commission.

United Air Lines, Inc., et al., 50 Cal. P.U.C. 563 (1951); certiorari denied, *United Air Lines v. Commission*, 37 A.C. 633, 1 (1951); appeal dismissed, *United Air Lines v. Commission*, 342 U.S. 908 (1952).

Until Appellant Commission issues such an order pursuant to the procedural provisions of the California Public Utilities Code, and until such an order becomes effective, Appellee air carriers subject themselves to no

liability for penalties under Section 2107 of the Public Utilities Code by reason of their failure to file tariffs.

B. The letters from the Secretary of the Commission instructing United to file its tariffs were not issued pursuant to the procedural provisions of the Public Utilities Code and are not orders of the Appellant Commission which may be enforced by contempt proceedings or penalty actions brought pursuant to Section 2107 of the California Public Utilities Code.

Appellee air carriers state that prior to the trial of the case that Appellant Commission made no indication that it did not consider its letters to Appellees to be final administrative orders and determinations. The explanation is obvious. Prior to the trial of the case Appellants had no thought that anyone would construe the letters from the Commission Secretary to be final administrative orders and determinations.

Appellee United is familiar with Commission procedures, and Appellee air carriers are presumed to know that the Commission must proceed with an orderly hearing on the complaint of a proper party or in a formal investigation instituted on its own motion before it can make a final determination and issue an effective and enforceable order directing Appellee air carriers to file tariffs with the Commission. The record shows Appellee air carriers were not misled by the letters from the Commission Secretary.

We quote from the transcript of the hearing for preliminary injunction, August 8, 1952, pages 49 and 50:

"Judge Orr: It is our thought, Mr. Treadwell, that right now your job is to convince us that this is the proper forum to bring this action before.

"Mr. Treadwell: Oh, yes, I will be glad to do that.

"Judge Orr: We are more concerned about that right now than any other phase of the case.

"Mr. Treadwell: Well now, the situation is this, your Honor, on that: If the Public Utilities Commission had made some order which controls this route, undertook to control the route, there is no doubt that the proper procedure would be a writ of review from that order to the Supreme Court of the United States [California]. That would be what would be the actual way to proceed, the way you could proceed.

"But there is nothing of that kind here. There is no order. We have waited now a minimum of six years, and probably much longer, according to the allegation of the complaint . . ."

We also quote from pages 63 and 64 of the same transcript, Mr. Treadwell speaking:

"... if the Commission only threatened something, if they actually had done something, if they actually had done something, our remedy of course would be to go to the Supreme Court on a writ of review."

As recently as February 19, 1953, Appellee air carriers on page 7 of their answer to Appellants' motion for new trial in comparing the facts of *Public Service Commission of Utah v. Wycoff*, 344 U.S. 237 (1952) with those of the case here under consideration, stated regarding the present case: "There was no litigation pending, nor was there any existing administrative action concerning the route at the time the suit was commenced."

We can only ask why should Appellants have informed Appellee air carriers that the letters from the Commis-

sion Secretary were not to be construed as final administrative orders and determinations when Appellee air carriers themselves, both priorly and subsequently to the trial of this matter, declared such to be the case?

- C. Appellants have made no threat to institute penalty actions against United by reason of its refusal to file tariffs of its rates covering its Catalina operations.

We have shown that there is no basis in law for the institution of penalty actions against Appellee United by reason of its refusal to file tariffs pursuant to the instructions contained in the letters from the Commission Secretary.

The letters from the Secretary of the Commission contain no threats that Appellants will institute penalty actions if the tariffs are not filed. We have previously pointed out in our jurisdictional statement that Appellants have made no such verbal threats.

Finding 11 of the Three-Judge District Court states that Appellants disclaim any intention of instituting proceedings to recover penalties against Appellee United for its failure to file tariffs with the Commission unless and until such time as United fails to file its tariffs with Appellant Commission after having been formally ordered to do so in a proceeding instituted before the Commission for the purpose of ascertaining jurisdiction.

Appellees have pointed out that Appellants in the past have caused proceedings to be instituted in the California courts for the recovery of penalties against various air carriers, including Appellee United, in other cases wherein

disputes have existed concerning the regulatory jurisdiction of Appellant Commission.

A brief summary of the facts and the considerations which led Appellant Commission to institute the penalty action against Appellee United will disclose matters *which are entirely dissimilar and not present in the case here under consideration.*

Prior to March 1, 1951, United had tariffs on file with the Public Utilities Commission covering its coach fares between San Francisco and Los Angeles, and these fares were thereby established by the Commission under Section 22 of Article XII of the California Constitution.

United, prior to March 1, 1951, applied to the Public Utilities Commission for authorization to increase such coach fares on March 1. The Commission refused to grant the application because insufficient information had been furnished. Nevertheless, on March 1, United increased its fares without the necessary authorization from the Commission.

After the institution by the Commission of a formal investigation and public hearing the Commission issued its Decision No. 45624, 50 Cal. P.U.C. 563, effective May 9, 1951, authorizing United to increase its fares and ordering United to make reparation of the excess fares collected between March 1 and May 8, 1951, inclusive. A petition for writ of review of this decision was filed with the California Supreme Court. The writ was denied. *United Airlines v. Commission*, 37 A. C. 563, 1 (1951). The appeal to this Court was dismissed on the ground that no sub-

stantial Federal question was involved. *United Airlines v. Commission*, 344 U. S. 237 (1952).

Subsequently, the People of the State of California filed a penalty action against United under Section 2107 of the California Public Utilities Code. This proceeding was filed because United, in violation of the provisions of Sections 20 and 22 of Article XII of the California Constitution, had charged during the period March 1 through May 8, 1951, fares in excess of those established and authorized by the Commission. Also, the Commission anticipated that United actually would reparate only a small amount of an estimated \$66,500 excess fares which had been unlawfully collected, by reason of (1) the inadequacies of its own records, (2) the lapse of time between March 1, 1951, and the final adjudication of the matter in the United States Supreme Court, and (3) the fact that the excess charge on each one-way fare amounted to only \$1.75. United's reparation program is now complete. An estimated \$65,000 of excess fares unlawfully collected remains unrefunded. Unless these funds are recouped through penalty actions, or otherwise, by the People of the State of California, United will have profited substantially from its unlawful disregard of Commission jurisdiction.

Do the above essential facts exist in the present case? The answer is an unequivocal *no*! The Commission has made no claim that Appellee air carriers have charged fares in excess of those established and authorized by the Commission, but, on the contrary, admits that no fares covering Appellee air carriers' Catalina operations have

been established by the Commission. Appellants are here asserting only that they should be permitted to institute a proceeding before the Commission for the purpose of determining whether rates covering Appellee air carriers' Catalina operations should be established pursuant to Section 22 of the California Constitution.

In the previous *United Air Lines* case before this Court the Commission argued that no substantial Federal question was involved, and this Court agreed. In the present case Appellants are now arguing that the issues involved are substantial because they involve the same principle which this Court sustained in Appellants' favor in the proceeding adverted to above.

D. As no substantial question concerning the validity of a state statute (i.e., Section 2107 of the California Public Utilities Code) under the Federal Constitution is in issue, the Three-Judge Federal District Court has no jurisdiction under Section 2361 of Title 28, United States Code, and should have dissolved itself.

We again refer this Court to the cases cited in paragraph numbered 3 under the heading "The Questions Are Substantial" in our jurisdictional statement on file herein.

E. The institution of an investigation before Appellant Commission to determine whether Appellant Commission should establish rates for the transportation in question pursuant to Section 22 of Article XII of the California Constitution will not subject Appellees to irreparable injury in an equitable sense even though Appellee air carriers may expend sums in excess of \$3,000 in responding to such investigation.

Appellee air carriers claim that a case or controversy exists under Section 1331 of the Judicial Code, 28 U. S. Code 1331, wherein the sum of more than \$3,000 is in-

volved because the Three-Judge Federal District Court has found that the sums which Appellee air carriers will expend in responding to an investigation proceeding before the Appellant Commission to determine whether said Commission should establish rates for Appellee air carriers' Catalina operations will exceed \$3,000. Just as illogically Appellee air carriers could argue that there is a case or controversy involving over \$3,000 because Appellants and Appellees have expended and will expend aggregate sums considerably in excess of \$3,000 in prosecuting and defending the present action in the Federal District Court and the United States Supreme Court, and also in the United States Court of Appeals for the Ninth Circuit where Appellants have taken a precautionary appeal to protect themselves should this Court hold that the Three-Judge Federal District Court had no jurisdiction and should have dissolved itself.

The sums which Appellees may expend in any forum resolving the issues now before this Court do not constitute the subject matter of this action nor do they constitute such irreparable injury as will entitle them to equitable relief.

~~Appellees~~ actually may incur greater expenditures by reason of their seeking to have the issues determined first in the Federal District Court instead of permitting the administrative process to take its normal course.

Who can say what order would have emanated from Appellant Commission were the facts and legal issues fully presented to it for determination? Certainly the Commission is not bound by the opinions of its Chief

Counsel in deciding matters under consideration before it. It renders its own decisions after due deliberation upon the matters presented at the hearing. On many occasions the Commission has modified or reversed its own decisions in the light of matters presented for consideration on rehearing.

Suppose the Commission had formally ordered Appellee air carriers to file tariffs covering their Catalina operations and Appellees had filed a petition for writ of review with the California Supreme Court. Who can say what disposition would have been made of such a petition by the California Supreme Court? Certainly Appellants would be less likely to seek an appeal to this Court from an adverse decision of the California Supreme Court than from an adverse decision of a Federal District Court because the decision of the California Supreme Court on questions of State law would be final against Appellants.

Suppose this Court agrees with Appellants that Appellee air carriers must exhaust their administrative remedies before Appellant Commission and their remedies in the courts of the State of California before this Court will consider the Federal issues on their merits.

The decision of the District Court assumes to decide that requiring a litigant to exhaust his administrative remedies subjects him to irreparable injury. Under the social compact of a nation devoted to the principle that it shall be a government of laws and not of men, there is implicit the condition that orderly and lawful proceedings before proper governmental bodies must be required even though expense, annoyance and displeasure be incurred in

such proceedings. It is a part of the small price we pay for ordered liberty, freedom and justice. We assert that the restraining of the sovereign rights of a State by a Federal court presents a question of the greatest moment and one which this Court, as the final lawful tribunal of the land, should view with the gravest concern.

- F.** There is no evidence in the record and consequently no finding that Appellant Commission will establish rates for Appellee United covering the operations in question different than the rates already established in its tariffs on file with the Civil Aeronautics Board. Consequently, Appellees' concern regarding federal penalties is premature.

Appellee United's concern over Federal penalties is premature.

If Appellant Commission establishes the same rates as have been established in tariffs on file with the Civil Aeronautics Board, Appellee air carriers have no problem respecting penalties. If Appellant Commission establishes different rates, its order may be stayed until the jurisdictional questions are resolved.

In any event, no controversy arises until Appellant Commission has taken appropriate administrative action establishing rates for Appellee air carriers' Catalina operations.

- G.** This Court's recent decision in *Public Service Commission of Utah v. Wycoff* supports Appellants' contention that exhaustion of the administrative processes before Appellant Commission is a condition precedent to the exercise of jurisdiction by the Federal District Court.

The decision of this Court in *Public Service Commission of Utah v. Wycoff*, 344 U.S. 237 (1952) states on pages 240-241:

"... In addition to defects that will appear in our discussion of declaratory relief, it [this proceeding] is wanting in equity because there is no proof of any threatened or probable act of the defendants *which might cause the irreparable injury essential to equitable relief by injunction.*" (Emphasis added.)

This statement doesn't say that there was no proof of any threatened or probable act of the defendants. It says that there was no proof of any threatened or probable act of the defendants "which might cause the irreparable injury essential to equitable relief by injunction." This Court knew that in its brief the Utah Commission had asserted it would prevent Wycoff from conducting the business in question unless and until authorized to do so by appropriate administrative order.

The *Wycoff* decision on page 244 continues:

"... We may surmise that the purpose to be served by a declaratory judgment is ultimately the same as respondent's explanation of the purposes of the injunction it originally asked, which is '*to guard against the possibility* that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission.' (Emphasis supplied.)"

On page 245 of the decision this Court states:

"... We are also told that the Commission filed a petition in Utah state court to enjoin respondent from operating between a few specified locations within the State, but that process was never served and nothing in the record tells us what has happened to this action. We may conjecture that respondent fears some form of administrative or judicial action

to prohibit its service on routes wholly within the State without the Commission's leave. What respondent asks is that it win any such case before it is commenced. . . ."

Appellee air carriers have brought this action to guard against the possibility that Appellant Commission in a proceeding proposed to be brought before itself to determine whether it has jurisdiction to and should establish rates covering the operations in question will establish such rates. Appellee air carriers ask that they win any such proceeding before it is even commenced. Even after the administrative process is complete, Appellee air carriers will probably not subject themselves to the possibility that penalty actions may be brought against them, because (1) Appellant Commission may establish as the rates for the operations in question, rates which Appellee air carriers now have on file with the Civil Aeronautics Board, and (2) the effectiveness of any such order may be stayed by the Appellant Commission itself, or by the California Supreme Court and this Court, until the jurisdictional questions are fully clarified and determined.

In the *Wycoff* decision, on pages 245-247, this Court continues:

"... , this dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment. If there is any risk of suffering penalty, liability or prosecution, which a declaration would avoid, it is not pointed out to us . . .

"Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to preempt and prejudice issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Eccles v. Peoples Bank*, 333 U. S. 426. See *Colgrove v. Green*, 328 U.S. 549. Responsibility for the effective functioning of the administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts."

The issuance of a rate order by Appellant Commission establishing rates for the operations in question would be the exercise of legislative authority delegated to Appellant Commission. Such a rate order has not yet been issued. Nevertheless, Appellees urge and the Federal District Court has declared that Appellant Commission has no power to issue an order establishing such rates, or even to consider the establishment of such rates, in a proceeding instituted before itself pursuant to the provisions of the California Public Utilities Code. We urge that this Court not permit the quasi-legislative processes under which Appellant Commission functions to be so aborted.

II

AS AN ADEQUATE REMEDY EXISTS IN THE COURTS OF THE STATE OF CALIFORNIA FOR THE PURPOSE OF REVIEWING ANY ORDER ISSUED BY APPELLANT COMMISSION PERTAINING TO THE SUBJECT MATTER OF THIS ACTION, THE FEDERAL DISTRICT COURT SHOULD HAVE REFUSED TO EXERCISE JURISDICTION IN THIS CASE.

This Court was concerned with the Federal-State relationship in the *Wycoff* case. The Court undoubtedly will be concerned with the Federal-State relationship in the case now being considered.

On page 247 of the *Wycoff* case this Court's enunciation of the principle involved is clear:

"Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the state. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the state affected. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the Commission cannot hear evidence and decide the matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal

judgment serves no useful purpose as a final determination of rights.

"The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right."

✦ We again wish to point out to this Court that Appellants are making no claim under Federal law. The claim of jurisdiction over Appellee air carriers' rates is founded on Section 22 of the California Constitution. If Appellant Commission is permitted to proceed with its hearing the Federal question will be raised only as a matter of defense by the Appellee air carriers. The language from pages 248 and 249 of the *Wycoff* case quoted in our jurisdictional statement shows that under these circumstances Appellee air carriers are entitled to no equitable relief in the Federal District Court.

Appellee air carriers assert that Section 20 of Article XII of the Constitution of California limits judicial review of rate action by Appellant Commission to questions of confiscation, and claim that since the review is so limited it is inadequate for the controversy here involved.

We wish to point out to this Court that Section 20 of Article XII of the California Constitution is not involved in this proceeding. No application to increase rates or charges for the transportation in question has been filed by Appellee air carriers with Appellant Commission.

Section 20 reads as follows:

"No railroad or other transportation company shall raise any rate or charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the railroad commission [now Public Utilities Commission] provided for in this Constitution, that such increase is justified, and *the decision of the said commission upon the showing so made shall not be subject to review by any court except upon the question whether such decision of the commission will result in confiscation of property.*" (Emphasis added.)

The above-quoted limitation is on judicial review of a Commission decision upon a showing whether an increase in rates is justified, not on a Commission decision on the question whether it has jurisdiction to establish rates for a carrier.

This Court will note that Appellee United had no hesitancy in urging review of jurisdictional matters in its recent appeals from Commission Decision No. 45624, *United Air Lines, et al.*, 50 Cal. P.U.C. 563 (1951), to the California Supreme Court and to the United States Supreme Court, *supra*. We are confident that both courts had no hesitancy in considering on their merits the jurisdictional questions raised by United. It is preposterous for Appellee air carriers to urge before this Court that they are precluded under California law from obtaining effective judicial review of rate action taken by Appellant Commission when no issue of confiscation, but only issues relating to jurisdiction, are involved.

Sections 1756 through 1767 of the California Public Utilities Code not only provide adequate, but also preferred, judicial review of orders and decisions of the Appellant Commission. If, as Appellees state, their remedies in the California courts are *niggardly*, it is because of the questionable merits of their case and not because inadequate provision has been made under the California law for judicial review.

III.

TRANSPORTATION BY APPELLEE AIR CARRIERS ONLY BETWEEN THE MAINLAND OF CALIFORNIA AND CATALINA ISLAND IS WHOLLY WITHIN THE STATE OF CALIFORNIA AND INVOLVES INTRASTATE AND NOT INTERSTATE COMMERCE. THE RATES COVERING SUCH TRANSPORTATION ARE SUBJECT TO THE JURISDICTION OF THE APPELLANT COMMISSION.

A proceeding to ascertain the exact boundaries of the State of California is now before this Court. *United States v. California*, No. 6, Original.

In this proceeding the State of California claims that the waters between the mainland of California and Catalina Island are inland waters of the State of California. The Report of the Special Master dated October 14, 1952, finds otherwise, but the State of California has filed exceptions to this report.

Appellants herein likewise claim that the route in question is wholly within the boundaries of the State of California. In support of this claim, we refer this Court to the comprehensive brief dated June 6, 1952, submitted by the Attorney General of the State of California in the

proceeding before this Court, entitled *United States v. California*, No. 6 Original.

We shall briefly state the arguments in support of our claim that the route in question is wholly within the boundaries of the State of California.

Section 1 of Article XXI of the California Constitution of 1849 defines the westward boundary of the State of California as follows:

"Section 1. The boundary of the State of California shall be as follows: . . . thence running west and along said boundary line, to the Pacific Ocean, and extending therein three English miles; thence, running in a northwesterly direction and following the direction of the Pacific Coast, to the forty-second degree of north latitude; thence, on the line of said forty-second degree of north latitude, to the place of beginning. Also all the islands, harbors, and bays along and adjacent to the coast."

Congress accepted the California Constitution and passed the Act of Admission. (Act of Sept. 9, 1850, 9 Stat. 452.)

Under the decision of this Court in *United States v. California*, 332 U.S. 19, this Court recognized that all waters shoreward of the base line of the three-mile marginal belt are inland waters. Hence, all the area within California constitutional boundaries, with the exception of the three-mile marginal belt, constitute inland waters of the State.

The inclusion of the islands as specified in the California Constitution strongly suggests that the boundary was in-

tended to run around them. The phrases "running in a northwesterly direction" and "following the direction of the Pacific Coast" indicate that the boundary of California runs outside the off-lying islands.

Such a boundary would be consistent with the position taken by the United States in the Alaska Boundary Arbitration that the relevant coast line for boundary purposes is the political coast line which treats all off-lying islands as part of the mainland (4 Alaska Boundary Arbitration 31) and with the decision of the International Court of Justice in *United Kingdom v. Norway*, I.C.J. Reports, 1951, p. 116, previously referred to in our jurisdictional statement.

Sound historical basis supports the establishment of the California boundary so as to include as its inland waters the area shoreward of the off-lying islands. In 1790, when California was still a Spanish possession, England expressly stipulated in Article 4 of the Nootka Treaty with Spain that "British subjects shall not navigate nor carry on their fisheries in the said seas within the distance of 10 maritime leagues from any part of the coast already occupied by Spain." (W. R. Manning, *The Nootka Sound Controversy*, Am. Hist. Assn. Annual Report 1904, p. 279.) A line 10 maritime leagues from the coast would include the waters between the California mainland and Catalina Island.

In 1879 the last sentence of Section 1 of Article XXI of the California Constitution was revised to read: "Also, including all islands, harbors, and bays along and adjacent to the coast."

We quote from the California Attorney General's brief dated June 6, 1952, in *United States v. California*, No. 6, Original, the discussion concerning certain California cases.

Pages 49 and 50:

"The first case in which the constitutional provision came before the California Supreme Court was *Ex parte Keil*, 85 Cal. 310 (1890). There the Court held that the transportation of two sailors from the California mainland to Catalina Island did not constitute taking them 'out of this state' within the meaning of the California kidnapping statute. (Penal Code Sec. 207.) The Court reached the conclusion as a matter of construction of the Penal Code and it did not decide the 'nice and important question, as to which the Court is not agreed, . . . whether or not any part of the channel between Santa Catalina and the mainland is, as between the state and the nation, or as between the United States and foreign nations, a part of the high seas.' However, the concurring opinion by two judges makes it apparent that the other five members of the Court were of the opinion that the channel waters were a part of this state.¹⁸"

Note 13 on page 50 reads:

"¹⁸In *Wilmington Transportation Co. v. Railroad Commission*, 166 Cal. 741 (1913), affirmed 236 U.S. 153 (1915), the California Supreme Court held that transportation of freight and commerce from the California mainland to Catalina is not 'commerce with foreign nations' so as to oust the State Railroad Commission of jurisdiction. The Court assumed that the cross-channel voyage took the vessels on to the high seas and out of the jurisdiction of California. Since, however, the question was not raised or argued, these

assumptions cannot be considered authoritative. Moreover, in considering the effect of this case, it is well to bear in mind the following statement by the International Court of Justice in *United Kingdom v. Norway*: 'The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice.' (Judgment p. 138.)

Pages 51 and 52:

"Probably the most significant of the California Supreme Court cases is the most recent one, *People v. Stralla*, 14 Cal. 2d 617 (1939). The question in the case was whether a gambling ship anchored four miles from shore in Santa Monica Bay was within California's territorial jurisdiction so as to be subject to her criminal statutes. The District Court of Appeal held that there was no such jurisdiction.

"In his petition for hearing in the Supreme Court the Attorney General of California urged as his first point that Santa Monica Bay was a bay within the meaning of that term as used in the California constitutional provision. The Attorney General went on, however, to devote a section of his petition to the proposition that under the Constitution, 'That body of water lying easterly of the islands adjacent to the coast is within the boundaries of the state of California.' In the course of the argument, the Attorney General pointed out that 'by the very words of the Constitution the islands are included within the boundary,' and that 'by including the islands within the boundary, the water lying easterly of the islands is necessarily within the boundary.' This position ad-

vanced by California constitutes in itself an assertion of jurisdiction by the state.

"... the United States Attorney, who stated (Appendix 3, p. 2) that he was 'acting on the express direction of the Attorney General of the United States and in the name and in behalf of the United States of America,' filed an *amicus curiae* brief in support of California in which he adopted the brief for California in its entirety. (Appendix 3, p. 12.) On the basis of these briefs, the California Supreme Court determined that Santa Monica constitutes a bay within the meaning of that term as used in the Constitution of 1849. Consequently the Court held that 'the jurisdiction of the state extends over the waters of Santa Monica Bay landward from a line drawn between its headlands, Point Vincente and Point Dume, and *at least* for a distance of three miles oceanward from that line.' (14 Cal. 2d, at 633.) The inclusion of the phrase 'at least' in the holding indicates that while the Court was following the salutary principle of deciding no more than necessary to dispose of the case before it, it wished to preserve California's jurisdiction beyond the area in dispute." (Italics ours.)

In 1949 the California legislature in Section 170 of the Government Code spelled out with more precision the western boundary which was defined in the Constitution one hundred years earlier:

"170. *Declaration of boundary of State.* To give greater precision to the boundary of the State of California as defined in Article XXI of the Constitution, it is hereby declared that the part of the boundary which is described as 'running in a northwesterly direction and following the direction of the Pacific

Coast to the forty-second degree of north latitude,' and as 'including all the islands, harbors, and bays along and adjacent to the coast,' runs and has in the past run three English nautical miles oceanward of lines drawn along the outer sides of the outermost of the islands, reefs and rocks along and adjacent to the mainland and across intervening waters; . . ."

Section 171 of the Government Code defines inland waters as follows:

"171. *Inland waters of State defined.* All waters between the mainland and the outermost of the islands, reefs and rocks along and adjacent to the coast of the State of California from which the boundary of the State is measured, and all waters between the islands, reefs and rocks themselves, are declared to be and to have been in the past inland waters of the State. Similarly, all waters within the lines around harbors and across bays, from which the boundary of the State is measured, are declared to be and to have been in the past inland waters of the State. These waters are 'waters thereof' within the meaning of that phrase in Section 25 of Article I of the Constitution."

We quote further from the brief of the Attorney General of California, pages 57 and 58:

"In establishing its seaward boundary so as to assert jurisdiction over the channels, bays, and harbors along its coast, California was acting well within its authority under the federal system. In *Manchester v. Massachusetts*, 139 U.S. 240 (1891) the United States Supreme Court had before it a situation which closely parallels the assertions of jurisdiction

that have been made by California. The Public Statutes of Massachusetts provide that 'when an inlet of the sea does not exceed two marine leagues in width between its headlands,' the boundary of the state is a 'straight line from one headland to the other.' Massachusetts sought to enforce in Buzzard's Bay its statutes regulating fishing which were confined by their terms to waters 'within the jurisdiction of this Commonwealth.' Manchester challenged the enforcement of the regulatory statutes on the grounds that the waters of the Bay were beyond the jurisdiction of Massachusetts. He argued that jurisdiction over the waters of the Bay rested 'upon rights of sovereignty inseparably connected with national character' and thus was exclusively vested in Congress.

"The Supreme Court explicitly upheld the authority of Massachusetts to define its boundaries so as to bring within its jurisdiction such inland water areas as Buzzard's Bay. The Court said:

"... Within what are generally recognized as the territorial limits of States, by the law of nations, a State can define its boundaries on the sea and the boundaries of its counties; and by this test the Commonwealth of Massachusetts can include Buzzard's Bay within the limits of its counties."

As this quotation indicates the only restriction placed by the Court on the State's power to assert jurisdiction over inland waters was that the assertion must not exceed the limits of international law. The Court went on to hold that in the absence of any conflicting federal regulation, Massachusetts could exercise its jurisdiction over the Bay by enforcing its statutes regulating fishing."

We also quote from pages 118-121 of the brief of the Attorney General of California:

"1. Many nations have found it advantageous to adopt the exterior coastline extending around off-lying islands as the baseline for their marginal sea. These nations include Australia, Canada, Denmark, Ecuador, Fiji, Finland, France, Hawaii, Iceland, Iran, Norway, Russia, Saudi-Arabia, Sweden;

"2. The system of the exterior or political coast line contravenes no principle of international law;

"3. The use of the exterior coast line as a base line for the marginal sea does not depend on any arbitrary or limited distance that such a line may extend across a water area. The line in each case is a political line based upon laws or decrees of a sovereign state and not upon any arbitrary limitation of distance;

"4. That the United States is free, if it finds that it is in the national interest to do so, to recognize and declare that the waters between the off-lying islands of California and the mainland are wholly inland waters.

"*National Security.* The Supreme Court recognized the close relationship between the marginal belt and our national security by pointing out that it was a 'protective belt' which will be of 'crucial importance should it ever again become impossible to preserve that peace.' (332 U. S. at 35.) As this statement by the Supreme Court indicates, the military advantage or disadvantage of any of the suggested locations of the marginal belt is a matter of the highest importance to our national security.

"The strategic importance of the California coastal areas is amply demonstrated by mentioning a few of the many military installations which dot the shoreline and the offlying islands of the area in issue here. San Clemente Island has been completely taken over by the Navy and civilians are not permitted to enter. [Tr. p. 613.] Defense installations have been made on San Miguel and San Nicolas Islands in the Santa Barbara Channel. [Tr. p. 330.] A substantial part of the facilities on Catalina Island were taken over for defense purposes during World War II.

"These islands guard a chain of Army, Navy and Air Corp bases on the shore of the mainland. Shoreward from the Santa Barbara Channel lies Point Mugu, an important guided missile installation, and Point Hueneme, which has tremendously expanded as a Navy base in recent years. [Tr. p. 248.] San Pedro Bay is a western base for the Pacific Fleet of the Navy, as well as being adjacent to the Navy Air Station at Reeves Field and the Army's Fort MacArthur. San Clemente Island protects the approach to the major Navy base at San Diego, the Navy Air Station at North Island and the Marine Base at Camp Pendleton.

"The presence of these vital military installations in the coastal areas in issue here make it especially relevant to reiterate that the distribution of rights in the offshore area among various nations will be determined by fixing the outer limits of inland water. As we move seaward through the water areas which our nation may designate as its inland waters and marginal belt to the high sea, the rights and powers of the United States diminish, while conversely, the rights of foreign nations increase. This is strikingly illus-

trated by the rights of foreign warships and airplanes in the respective zones in the offshore area.

"Foreign warships and aircraft are at all times wholly unrestricted in their movement of the high seas. The rights of foreign warships in the marginal belt are at present in doubt, as shown by the fact that the International Court of Justice declined to rule on this point in the Corfu Channel case.²⁹ But in its inland waters, the adjacent nation has exclusive and complete control.

"The agency which determines the outer limits of inland waters will thus be doing much more than fixing a theoretical line. It will be determining how near foreign warships and aircraft may lawfully approach our shores and harbor installations. It also will be fixing the location of our neutrality zone, for that has been one of the historic functions of the marginal belt. The sum of the matter is that the fixing of the baseline will determine whether foreign nations are to have rights in the waters surrounding our island military installations and between these installations and our coastal bases or whether those waters are to be set aside for the exclusive jurisdiction of the United States.

"It would appear that there are military dangers to placing the belt immediately adjacent to our shores, and on the other hand, military advantages to placing it as far seaward as possible. It is the belief of California that the protection of our harbors, the security of our military bases on the shore and on the offshore islands, and the integrity of our inland shipping lanes demand the placement of the marginal belt as far sea-

²⁹1. C. J. Reports, 1949, p. 4.

ward as can be done within the limits of international practice. There would appear to be a substantial risk of subverting the best interests of our nation by the adoption of a proposal for the location of the marginal belt, such as that offered by Plaintiff, which completely ignores the significance of the areas to our National security."

In support of their position that the Civil Aeronautics Board has exclusive jurisdiction over the rates in question, Appellee air carriers state that they have had tariffs of rates covering the operations in question on file with the Civil Aeronautics Board for thirteen years and that they have never filed tariffs of such rates with Appellant Commission. Even though this Court finds that Appellee air carriers must file rates covering its Catalina operations with Appellant Commission, Appellee air carriers undoubtedly will continue to file such rates with the Civil Aeronautics Board in so far as they involve interstate commerce. United is an interstate as well as an intrastate air carrier and hence must file rates covering its California operations both with the Civil Aeronautics Board and with the Appellant Commission. For example, tariffs of United's air coach fares for passenger transportation between San Francisco and Los Angeles are on file with both Commissions. The fact that the Appellant Commission may not have asserted jurisdiction over rates in question for a period of years does not destroy its authority to do so. *Kelly v. Washington*, 302 U.S. 1 (1937).

The case of *Northwest Airlines v. Minnesota*, 322 U.S. 292 (1944) to which reference is made by Appellee air

carriers refers to "regulating air commerce" and not to "regulating air transportation". Under the Civil Aeronautics Act the Civil Aeronautics Board regulates only the rates charged by air carriers in "air transportation".

We submit that the route of Appellee air carriers in question is an intrastate route, and the intrastate rates in question may be established by Appellant Commission. *United Air Lines, Inc. et al.*, 50 Cal. P.U.C. 563 (1951); certiorari denied, *United Air Lines v. Commission*, 37 A. C. 633, 1 (1951); appeal dismissed, *United Air Lines v. Commission*, 342 U.S. 908 (1952).

IV.

THE PROVISIONS OF THE CONSTITUTION OF THE STATE OF CALIFORNIA UNDER WHICH APPELLANT COMMISSION CLAIMS JURISDICTION OVER APPELLEE AIR CARRIERS PERTAIN ONLY TO THE ESTABLISHMENT AND REGULATION OF RATES, FARES, AND CHARGES. APPELLANTS HAVE NEVER CLAIMED JURISDICTION OVER ANY OTHER ASPECT OF APPELLEE AIR CARRIERS' OPERATIONS. CLEARLY, IN SO FAR AS THE JUDGMENT OF THE FEDERAL DISTRICT COURT PERTAINS TO MATTERS OTHER THAN THE ESTABLISHMENT AND REGULATION OF RATES, FARES AND CHARGES OVER THE ROUTE IN QUESTION, IT IS NOT SUPPORTED BY THE RECORD AND IS IN ERROR.

This Court will note that Appellee air carriers have made no comment regarding Appellants' claim that the judgment of the Federal District Court is too broad in its scope and hence clearly is not supported by the record.

CONCLUSION.

It is submitted (1) that neither the Three-Judge Federal District Court nor any Federal District Court had jurisdiction of the subject matter of this case because no definitive, final and effective administrative action has been taken by Appellants, (2) that even though the Federal District Court have jurisdiction it should have refused to exercise jurisdiction because the remedies in the California courts are adequate, (3) that in any event, this Court should render judgment in favor of Appellants because the route in question and the rates in question are intrastate, and (4) in so far as the judgment of the Federal District Court pertains to matters other than the establishment of rates over the route in question, it is in error.

The questions presented by this appeal are substantial. We urge this Court to deny Appellee air carriers' motion to dismiss or affirm and to note probable jurisdiction.

Dated, May 1, 1953.

Respectfully submitted,

EVERETT C. McKEAGE,

Chief Counsel,

J. THOMASON-PHELPS,

Senior Counsel,

WILSON E. CLINE,

*Attorneys for Defendants-
Appellants.*

Service of the within and receipt of a copy thereof is hereby

admitted this _____ day of May, 1953.

Attorney for Plaintiffs-Appellees.

Attorney for Intervenor-Appellee.